No. 84-648

Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS
CLERK

In The Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX COMPANY, INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Congress intended to authorize civil suits for treble damages under the Racketeer Influenced and Corrupt Organizations statute in cases where the injuries sustained are unrelated to the underlying purpose of the statute.

2. Whether Congress intended to authorize civil suits for treble damages under the Racketeer Influenced and Corrupt Organizations statute in cases where the defendants have never been convicted of any of the predicate crimes listed in the statute.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case provides a vivid illustration of the extent to which the private bar has misapplied the civil damages provisions of the Racketeer Influenced and Corrupt Organizations statute ("RICO") to conventional commercial disputes. It grows out of a joint venture between two trading companies—petitioner Sedima, S.P.R.L., a Belgian importer and exporter of industrial goods and respondent Imrex, a New York corporation specializing in the export of aeronautical and aerospace material. In 1978, the parties entered into a complex agreement for the fulfillment of certain procurement contracts let by Atelier de Constructions Electriques de Charleroi (A.C.E.C.), a subcontractor for the North Atlantic Treaty Organization, which was then in the process of upgrading NATO's surface-to-air missiles in Europe.

Under the terms of the joint venture, A.C.E.C.

would deliver its requirements and technical specifications to Sedima, which would then forward them to Imrex. Imrex would research the United States market, send quotes to Sedima and, upon approval, send the material purchased in the United States to Sedima for eventual delivery to A.C.E.C. Sedima negotiated the prices between the joint venture and A.C.E.C. The difference between that price and the cost of the item in the American market represented the gross profit of the joint venture to be divided between Imrex and Sedima, after accounting for a number of administrative and financial expenses. At the inception of the joint venture, the parties had agreed to exchange accountings of their transactions periodically.

Sedima filed this lawsuit against Imrex in 1982, claiming that Imrex had defrauded it by preparing false purchase orders and credit memoranda overstating the cost of the items shipped to Sedima for delivery to A.C.E.C. The effect of such an overstatement, it is alleged, was that Imrex was able to keep a greater proportion of the real profit on a transaction than was provided for in the joint venture agreement. This suit was filed before either side rendered a final accounting of its costs and expenses.

In its complaint, petitioner pleaded a number of claims based on the common law of contract and fraud. It then amended its complaint and sought treble damages and attorneys fees under the RICO statute, 18 U.S.C. 1964(c), charging that Imrex and its management had engaged in a "pattern of racketeering activity" by violating the federal mail fraud[1] and wire fraud[2] statutes. In pleading this RICO claim, the

[1]18 U.S.C. 1341.

[2]18 U.S.C. 1343.

complaint made no allegation of an injury caused by the pattern of racketeering activity that differed in any way from the injury attributed to the underlying "predicate acts" of fraud.[3] Nor did petitioner allege that respondents had been convicted of any of the predicate offenses enumerated in the RICO statute.[4]

The District Court dismissed the RICO counts for failure to allege the particular kind of injury required to make out a RICO claim for damages. Without deciding which of two competing analyses of "RICO injury" was correct—a racketeering-type injury or competitive injury resulting from racketeering activity—the court relied on the fact that there was "no allegation . . . of any injury apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud." Pet. App. 63a. The court reasoned that to "permit the RICO claim to stand under such circumstances would represent an unwarranted extension of the statute's coverage that is not supported by the case law." *Ibid.*

[3]The damages sought for the RICO claim were identical in amount with those sought in the previous counts of the complaint.

[4]After this case was filed, and with Sedima as complainant, the District Attorney of Nassau County, New York charged all respondents with grand larceny and falsifying certain "purchase order documents" used internally by the joint venturers. Since Gidon and Jacob Armon had already admitted technical violations of New York's broad business record statute (NY Penal Law §175.10) in depositions taken in this case, they agreed to allow the corporate defendant to plead guilty to two counts of that statute in January, 1985. A fine was imposed, and all other charges against all the respondents were dismissed. Violations of the business records statute could not be construed as any possible predicate act listed in Section 1961.

The Court of Appeals for the Second Circuit affirmed. It first held that a civil RICO damages claim must be premised on a showing of "racketeering injury"—defined as the special kind of injury typically caused by organized crime in its infiltration of legitimate businesses or operation of illegal enterprises. Pet. App. 27a-28a. In its view, no other rule would be consistent with the purposes for which RICO was passed. The court then held that a civil RICO claim also must be based on a pre-existing criminal conviction of the defendant with respect to the underlying predicate offenses. Pet. App. 28a-44a. The basis for this holding was the structure of the statute, which premises civil liability on a "pattern" of *criminal* predicate acts. The court concluded that Congress could not have intended to allow private citizens to bring actions in which they would seek to label someone a "racketeer" by proving such criminal conduct in a civil case. In so ruling, the Second Circuit pointed to the difficult burden-of-proof issues that would be raised by such a procedure, Pet. App. 39a-40a, and to the "liberal construction" provision of the statute,[5] which it viewed as indicative of a congressional assumption that civil RICO would be applied only against persons previously convicted of predicate criminal offenses, Pet. App. 40a-41a.

Judge Cardamone dissented. He argued that the prior conviction requirement was not supported by the language of the RICO statute. He then argued that Congress did not intend any rule requiring a special form of "RICO injury." Because several panels of the Second Circuit were considering simultaneously the issues raised here, the court took a vote on whether to consider the issues en banc. It

[5]Pub. L. No. 91-452, 904(a), 84 Stat. 947 (1970).

decided instead to issue the opinions in the order in which they were completed, thus making the opinion in this case the controlling law in the circuit. *See Furman v. Cirrito*, 741 F.2d 524, 525 (2d Cir. 1984).

SUMMARY OF ARGUMENT

1. The basic purpose of RICO was to attack organized crime. Congress sought to do this by creating a flexible prosecutorial tool aimed at the infiltration of legitimate businesses as well as the operation of wholly illegal organized crime enterprises. The civil damages provision added to RICO near the end of the legislative process did nothing to increase that intended scope. It is clear, therefore, that the widespread invocation of civil RICO in routine commercial disputes like this case is a development that Congress never sought to authorize. In view of the effect of this trend—the massive federalization and revision of numerous areas of commercial law—there is a clear need for a more careful interpretation of the statute that will effectuate the intent of Congress.

2. At minimum, Congress must have intended the courts to impose some substantive limits on the cases in which civil RICO can be used. Such a "RICO injury" requirement was foreshawdowed when Congress modelled the treble damages provision directly on the Clayton Act, with its analogous "antitrust injury" rule. The requirement can be defined on the basis of the concerns about organized crime reflected directly in the RICO statute. A RICO plaintiff must show an injury beyond the mere recitation of predicate acts, caused by an enterprise that, in its organization and its pattern of activities, conducts itself in a manner characteristic of organized crime.

3. In addition, the structure of RICO reveals a congressional intention that civil suits be brought only against those who have at least been convicted of underlying predicate offenses. The alternative approach of allowing civil plaintiffs to prove that their opponents are criminal racketeers simply is not a plausible interpretation of what Congress must have had in mind. It would expose defendants to the consequences of being labelled proven criminals without any of the traditional protections accorded to criminal defendants.

The civil RICO action is in fact a remedy to recoup economic loss from proven violators and to inflict the punitive aspects of treble damages and counsel fees against the intended targets of the statute.

ARGUMENT

I. THE CLEAR PURPOSE OF THE RICO STATUTE, AND ITS TREBLE DAMAGES PROVISION, WAS TO ATTACK ORGANIZED CRIME AND PROTECT THE VICTIMS OF ORGANIZED CRIME.

As the Second Circuit recognized, the federal courts have recently experienced an "explosion of civil RICO litigation." Pet. App. 7a. This relatively new statute has become a tool used frequently by litigants in a whole variety of commercial cases, including "typical business fraud cases, . . . 'garden variety' securities fraud cases, and . . . bank fraud cases." Pet. App. 10a (citing cases). The defendants in these actions, far from being limited to "racketeers," have included some of the largest and most successful cor-

porations in America. Pet. App. 9a (citing cases).

This general trend, exemplified by the facts of the instant case, plainly represents a gross distortion of the intent of Congress in passing RICO. Far from being a new tool in the on-going fight against the criminal syndicates, civil RICO has become a virtually limitless fount of federal jurisdiction over commercial disputes. As a result, it has given plaintiffs the unexpected windfall of a potential treble damages recovery, as well as the useful tactical device of being able to label their opponents "racketeers." In corresponding fashion, it has swept away carefully carved state[6] and federal[7] legal limitations on the rights and remedies of these same plaintiffs.

The divergence between these developments and the intent of Congress is not difficult to perceive. Congress went to the trouble of setting out its purposes in

[6] "For example, in the instant case, absent RICO the plaintiffs' opportunities for seeking punitive damages would be quite limited. Under New York law, there could be no punitive damages awarded under the contract-based counts in the complaint, *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976), and such damages could be awarded under the fraud counts only based on a showing of "criminal indifference to civil obligations." *Walker v. Sheldon*, 10 N.Y.2d 401 (1961). The effect of allowing a RICO claim here is to provide an award far greater than the actual damages available under state law—treble damages plus attorneys' fees.

[7] For example, in the securities field, this Court has applied a requirement of a purchase or sale of securities as a prerequisite to federal fraud claims. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Under RICO, such a requirement could be vitiated and a plaintiff could prevail by suing for mail or wire fraud where, for example, he is a shareholder who chose not to sell during a period of declining prices based on the repeated advice of a broker. Similarly, the generous damage provisions of RICO would effectively repeal the more limited civil damages provisions applied under section 10 of the Securities Exchange Act of 1934.

great detail in the statute that contained RICO. It then designed RICO in ways that, while flexible, plainly reflect that original intent. Finally, the particular circumstances under which the civil damages provision was included in the statute make it absolutely clear that the civil remedy was never intended to broaden the substantive scope of RICO. For these reasons, we believe that the language of the statute must be interpreted in a manner that limits civil RICO to its intended field of operation.

The RICO statute was first enacted as Title IX of the Organized Crime Control Act of 1970. In passing that act, Congress made it clear that it had one, and only one, purpose—combatting "organized crime." Indeed, the very first section of the act contained a lengthy recitation of the depredations inflicted on our society by organized crime, including "drain[ing] billions of dollars from America's economy," operating gambling, fencing, loan sharking and narcotics syndicates and "other forms of social exploitation," infiltrating and corrupting businesses and unions, destabilizing the economy, harming investors, burdening competition and interstate commerce, threatening domestic security, and otherwise "undermin[ing] the general welfare of the Nation and its citizens." Pub. L. No. 91-452, 84 Stat. 922-23 (1970). In light of these recognized problems, Congress set out to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Id. at 923. *See also Russello v. United States*, 104 S. Ct. 296, 302 (1983); *United States v. Turkette*, 452 U.S. 576, 588-89 (1981).

One of the measures adopted to attack the increasing "penetration of the forces of organized crime into the fabric of our society and our commercial life"[8] was Title IX—RICO. The "major purpose of Title IX [was] to address the infiltration of legitimate business by organized crime." *United States v. Turkette, supra*, 452 U.S. at 591. This concern was raised "again and again during the debates and in the hearings before the House and Senate." *Ibid.*[9] As Senator Hruska put it, RICO was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods." 116 Cong. Rec. 602 (1970). At the same time, however, as this Court recognized in *United States v. Turkette, supra*, Congress had a subsidiary but related purpose—attacking "enterprises" that are wholly criminal in nature. After all, such activities as loan sharking and narcotics dealing, by providing to organized crime "its primary sources of revenue and power," can themselves be a "springboard into the

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[8] S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969).

[9] *See, e.g.*, S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969) ("Senate Report") (RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce); *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 157 (1970) ("House Hearings") (Statement of Attorney General Mitchell) (Title IX is intended to "attack the 'property' of organized crime, and to protect legitimate businesses against the syndicates' infiltration"); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("Title IX is aimed at removing organized crime from our legitimate organizations"); *id.* at 35200 (remarks of Congressman St. Germain) ("Title IX . . . is aimed at keeping organized crime out of legitimate businesses through the use of both criminal and civil penalties.")

sphere of legitimate enterprise." 452 U.S. at 591.

These purposes are directly reflected in the central provision of RICO, 18 U.S.C. 1962, where Congress described the three kinds of activities that it sought to prohibit. First, in section 1962(a), Congress made it unlawful for anyone to use money derived from a "pattern of racketeering activity" to buy an interest in a commercial enterprise.[10] Then, in section 1962(b), it made it equally unlawful to acquire such an interest through some other means—coercion, fraud or the like—that would constitute a "pattern of racketeering activity."[11] Finally, in a somewhat more general provision, section 1962(c), Congress made it illegal to "conduct . . . the affairs" of any enterprise (legitimate or wholly illegal) through a pattern of racketeering activity.[12] These substantive provisions

[10]Section 1962(a) provides: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . ."

[11]Section 1962(b) provides: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[12]Section 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

were then tied to sections creating criminal[13] and civil[14] remedies.

The key term in each of the operative provisions of section 1962—the term that would be the linchpin for identifying and attacking organized crime—was a "pattern of racketeering activity." In that regard, Congress provided an extremely broad definition. It defined "racketeering activity" by reference to a long list of state and federal crimes ranging from "murder, kidnapping, gambling, arson, robbery, bribery, extortion [and] dealing in . . . drugs" to counterfeiting, theft, embezzlement, mail fraud, wire fraud, obstruction of justice, and securities fraud. 18 U.S.C. 1961(1). It then defined a "pattern of racketeering activity" as "at least two acts of racketeering activity" within ten years of each other. *Id.* 1961(5).

Obviously, these definitions do not strictly limit the application of RICO to cases that even resemble the concept of "organized crime" as it is generally understood. Whenever there is an identifiable "enterprise" (a legitimate one that has been infiltrated or simply an illegal "gang") and the potential defendants' conduct can be twice squeezed within the definition of one or more of the numerous crimes listed as possible "predicate acts," it can be argued that the

[13]18 U.S.C. 1963(a).

[14]In addition to the treble damages provision in section 1964(c), the statute provides for injunctions against violations issued at the behest of the government. 1964(a), (b), and for forfeiture, after a criminal conviction, of "any interest . . . acquired or maintained in violation" of the act, as well as of "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation" of the act, (1963(a)).

technical requirements have been fulfilled. Indeed, the plausibility of such an argument is what has led to the "explosion" of RICO claims that we have described.

The use of wire fraud and mail fraud statutes as the most commonly alleged predicate acts is due in large part to the very broad interpretation of those statutes in their basic applications. One court has characterized the stretch of such interpretations as "limitless." *U.S. v. VonBarta*, 635 F.2d 999, 1001, cert. den., 450 U.S. 998 (1981). Some courts have observed that the net effect of broad Civil RICO, based principally on mail and wire fraud claims, would be to grant a private right of action for those who were allegedly victimized by violations of these criminal statutes. See *Gramarcy v. Gramarcy Realty*, 591 F.Supp. 1408 (SDNY 1984). But the Courts have repeatedly held that there is *no* such private right of action. *Ryan v. Ohio Edison*, 611 F.2d 1170, 1177-79 (6th Cir. 1979). See also *Austin v. Merrill Lynch*, 570 F.Supp. 667 (W.D. Mich. 1983). (Indeed, this position follows the established rule that there should be no assumption of a private right of action under any federal statute where none is specified. *Sante Fe v. Green*, 430 U.S. 462 (1977).

It is clear, however, that the possible breadth of the literal terms of the statute is not, in this instance, an accurate indication of the intent of Congress. Put differently, nothing about the structure of RICO reflects a congressional purpose broader than attacking organized crime. On the contrary, breadth and flexibility were deliberately incorporated into the statute by Congress solely for the specific purpose of making it a potentially effective prosecutorial weapon against organized crime. Recognizing that it could not

simply legislate against "organized crime" *per se*,[15] Congress resolved to pass a much broader statute and rely on the discretion of federal prosecutors to apply it appropriately. For example, in the 1969 hearings on the Senate bill that was a precursor of the 1970 Organized Crime Control Act, Senator McClellan asked witnesses whether there was any way to "limit [the law's] application to organized crime."[16] He was told that there was no alternative to relying on prosecutorial discretion.[17] Later, he explained that it had proved "impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."[18] He made it clear, however, that Congress did not expect the law to be *applied* to any significant extent to persons outside organized crime.[19] In sum, Congress knew that the literal terms of the statute were broader

[15] *See* 116 Cong. Rec. 35343 (1970) (remarks of Rep. Celler); *id.* at 35344 (remarks of Rep. Poff). Clearly the law does not identify the *status* of the defendant, specifically to avoid constitutional proscriptions of which the drafters were aware. See, for example, *Robinson v. California*, 370 U.S. 670 (1962), *Scales v. U.S.*, 367 U.S 203 (1961).

[16] *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 347 (1969) (question addressed to Henry Ruth, Deputy Staff Dir. of the Katzenbach Comm'n on Law Enforcement and Administration of Justice).

[17] *Id.* at 347, 424.

[18] 116 Cong. Rec. 18940 (1970).

[19] 116 Cong. Rec. 18940 (1970). *See also* 116 Cong. Rec. 35200 (1970) (remarks of Rep. St. Germain) ("Law enforcement officials know who the racket leaders are. . . .")

The Department implemented this congressional directive by promulgating restrictive Guidelines to govern federal RICO prosecutions. *United States Attorney's Manual* §9-110.200 to.413. These guidelines require selective use of RICO and prior approval of any such prosecution by the Organized Crime and Racketeering Section of the Criminal Division.

than its intended scope, but, because it had no alternative, it relied on the good faith of those implementing the law to keep it within the limits that Congress itself thought appropriate.

For present purposes, the key is the fact that all of these decisions about the scope of RICO were made well before there was any provision in the act for private enforcement—*i.e.*, at a time when the attention of Congress was focused exclusively on the need to give new power to the federal prosecutors, who were to use that power selectively and appropriately. RICO was passed first in the Senate, in the form of a bill (S. 30), sponsored by Senator McClenllan, that did not include any provision for civil damages against violators. The bill then went to the House Judiciary Committee, which made a number of amendments aimed primarily at limiting the scope of RICO in order to reduce its vulnerability to constitutional attack.[20] In addition, the House added a civil damages provision later codified as 18 U.S.C. 1964(c). This change was made at the behest of Representative Sam Steiger and the American Bar Association, both of whom recognized that the civil action was to be patterned after the private remedy found in the Clayton Act.[21]

There is no indication that the House Judiciary Committee or anyone else viewed this change as altering the substantive scope of the statute. In proposing it, Representative Steiger simply argued that "those who have been wronged *by organized crime* should . . .

[20]*See* H. Rep. No. 91-1549, 91st Cong., 2d Sess. 32 (1970) ("House Report") (1970) ("The Committee's principal aim has been to eliminate provisions vulnerable to constitutional objections and to revise sections deemed to be unworkable so that the legislation will withstand future court challenge."

[21]House Hearings, *supra*, at 520, 548.

be given access to a legal remedy."[22] And there is no reason to believe that others viewed the matter differently. The House Report barely mentioned the amendment.[23] And the debates in the full House hardly discussed damages at all. Finally, when the bill went back to the Senate, its sponsor, Senator McClellan, labelled the House amendments "minor changes" and the Senate agreed to them without further delay.[24]

In sum, nothing about the legislative history of RICO in general, or the civil damages provision in particular, suggests any intention to broaden the scope of the act beyond the original goal of attacking organized crime. The means selected for achievement of that goal was a potentially broad statute combined with clear statements of a congressional desire to limit the application of the statute to its intended targets. Responsible prosecutors were to be the principal means for maintaining adherence to this limiting intent.

The notion of allowing civil damage suits by victims was never more than an adjunct of the primary goal, aimed at the same limited category of criminal syndicates. Above all, there is no indication whatever that in passing this new provision of the federal criminal code Congress intended to create a new, extraordinarily broad civil remedy in federal court for every person aggrieved by a series of acts that could

[22]House Hearings, *supra* at 520 (emphasis added).

[23]*See* House Report, *supra*, at 35 ("The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured.")

[24]116 Cong. Rec. 36293-96.

be fit within the scope of one of the several dozen possible "predicate acts" listed in section 1961. Indeed, there is every reason to conclude that Congress would have been astonished by the trend toward routine use of the treble damages provision in cases, like the present one, having none of the common-sense indicia of organized-crime involvement. It is with this background in mind that we proceed to analyze the specific issues of statutory interpretation raised in this case.

II. CONGRESS INTENDED TO AUTHORIZE DAMAGE SUITS ONLY IN CIRCUMSTANCES WHERE, IN VIEW OF THE PARTICULAR KIND OF INJURY SUFFERED, IT IS CLEAR THAT CIVIL ENFORCEMENT WOULD BE CONSONANT WITH THE OVERRIDING GOAL OF FIGHTING "ORGANIZED CRIME."

The first issue addressed by the court below was whether a private plaintiff seeking to invoke RICO must allege some special form of "RICO injury." In our view, such a concept amounts to a shorthand way of describing the substantive limitations that Congress intended to govern the applications of the statute. What the Second Circuit held, quite simply, was that a plaintiff must be able to show the kinds of injury that typically flow from the "infiltration of legitimate enterprises" or operation of "illegitimate enterprises" by organized criminal syndicates. Pet. App. 27a. Such an interpretation of RICO is consistent with the statutory language and is essential if the statute is to be applied in the civil context in a way that parallels its main intended role as a new tool in the battle against organized crime.

A. *The statutory Basis of an Injury Requirement*

As we have noted, Congress relied primarily on prosecutors themselves to exercise their discretion and limit the application of RICO to cases involving organized crime. That reliance generally has not proved to be misplaced. The issue presented here is whether Congress also intended to rely solely on the "discretion" of private plaintiffs concerning when it was appropriate to apply the severe sanction of treble damages. In our view, it is inconceivable that Congress chose to confer *carte blance* on private parties the power to invoke civil RICO whenever they can allege the existence of two illegal acts (but no convictions) and those acts fall within the definition of one or more of the predicate offenses listed in the statute.

Instead, we think it clear that Congress intended different limits. Faced with the impossibility of drafting precise language that would serve its purposes without providing opportunities for circumvention, it chose to rely on the courts to assure that civil RICO would be enforced in a way that furthered basic congressional intent. That judicial role necessarily involves the elaboration of standards for determining when plaintiffs have satisfied the requirements of section 1964(c) through a sufficient showing of an "injur[y] in [their] business or property by reason of violation" of the substantive RICO provision, section 1962. Such standards are not, as we have indicated, set out expressly in the statute. But in recognizing such standards, the courts would be performing their usual and appropriate function—"construing the details of an act in conformity with its dominating general purpose." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943). There is nothing novel about

interpreting a statutory "text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Id.* at 351. The alternative is not due deference to the legislature; it is abdication in the face of repeated applications of the statute that everyone concedes are outside the contemplation of Congress.[25]

This is especially true in view of the fact that Congress, while making very little about civil RICO explicit, pointed the way to limiting standards in the language it selected for the civil damages provision. As we have noted, that provision was modelled explicitly on the comparable language in section 4 of the Clayton Act.[26] Both provisions require an injury "by reason of" a substantive violation of the act. And in the Clayton Act context, this language has been interpreted by this Court as requiring an 'antitrust injury," defined as "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

The Second Circuit, following the lead of some

[25]The universality of this recognition was suggested when the Seventh Circuit in *Haroco* was constrained to concede that "it does not seem at all likely that Congress anticipated the application of civil RICO" to such cases, even as it approved that application. *Haroco v. American Nat'l Bank and Trust Co.*, 747 F.2d 384, 399 (7th Cir. 1984) (cert. granted, No. 84-822).

[26]15 U.S.C. 15 (providing that any "person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee") (emphasis supplied). *See also* 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff) (the addition of the damages remedy is "another example of the antitrust remedy being adapted for use against organized criminality").

earlier decisions,[27] held that the analogous "by reason of" language in section 1964(c) calls for a similar analysis of the fit between an injury and the policies incorporated in the RICO statute. In order to qualify for treble damages under such an approach, a plaintiff must do more than show that he sustained an injury that is somehow causally related to conduct that meets the technical requirements of section 1962.

He must show that the kind of injury he sustained was among those that Congress was seeking to prevent—injury resulting from conduct characteristic of organized crime.[28]

In our view, such an approach to civil damages under RICO is not only consistent with the statute, but the only way to apply the statute as it was intended.[29] Without a requirement of "RICO injury," the statute becomes a remedy that is out of control, benefiting plaintiffs and burdening defendants based simply on the fortuity of whether ingenious lawyers can somehow fit a commercial dispute within the remaining statutory requirements. It might be

[27]*E.g., Harper v. New Japan Securities Int'l*, 545 F. Supp. 1002 (C.D. Cal. 1982).

[28]This is quite different from saying that the statute can only be applied against "recognized" organized crime groups. Congress obviously intended RICO as a weapon against anyone taking on the general *characteristics* of organized crime. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 n. 17 (2d Cir. 1983).

[29]The "liberal construction" provision in the statute does not suggest to the contrary. It provides that RICO "shall be liberally construed *to effectuate its remedial purposes.*" Pub. L. No. 91-452, 904(a), 84 Stat. 947 (1970) (emphasis added). This reference to the particular remedial goals pursued by Congress, if anything, *supports* an approach that limits RICO to its intended scope.

necessary, of course, to allow a statute to sweep beyond its intended scope in certain circumstances in order to assure that it is fully applied where Congress wanted it to be. But that is not the situation with civil RICO. In the absence of a meaningful injury limitation, the unintended applications will, as can readily be seen by viewing federal court dockets, vastly outstrip the intended applications.

There are currently vast numbers of civil RICO cases pending in federal courts. Few of them have anything to do with activities that are characteristic of organized crime. On the contrary, almost all involve commercial disputes, *see, e.g., Dan River Co., v. Icahn*, 701 F.2d 278 (4th Cir. 1983) (tender offer); *In re Catanella*, 583 F. Supp. 1388 (E.D. Pa. 1984) (securities fraud) (citing numerous cases), or traditional tort litigation, *see, e.g., Martin v. Frank*, appeal pending, No. 84-6028 (9th Cir.) (attorney malpractice); *Great Lakes Concrete Pole Corp. v. Eash*, appeal pending, No. 83-1464 (6th Cir.) (products liability) and common law fraud, *Armco v. SLT Warehouse Co.*, appeal pending, No. 84-1828, (5th Cir.).

The net effect, in short, is to sanction under civil RICO a wholesale displacement of the civil povisions of the federal securities laws as well as "the displacement of state tort law into the federal courts." *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984). And all of this would be accomplished through a misinterpretation of a single sentence inserted into an organized crime bill without significant debate and without the slightest indication that Congress wanted it to happen.[30]

[30]The statistics of the Administrative Office of the United States Courts, cited by the Association of State Attorneys General at pgs. 22-23 of their amicus brief, are instructive. The numbers reveal that, "if most securities and fraud related cases were also RICO cases, RICO filing would not exceed 5,000, not more than 2% of all federal filings." id. pg. 23.

In this regard, it is pertinent to look at the *nature* of a "typical" RICO case as well as the absolute number of such cases. They are typically complex and involve high stakes in the commercial arena, not unlike securities and antitrust matters. Therefore, a broad reading of civil RICO might double overnight the courts' workload on time-consuming, complex, hotly contested commercial matters. This would increase the burdens on the District Courts all out of proportion to the relative percentage of "RICO-based" filings.

B. *Defining the Injury Requirement.*

The question becomes, therefore, whether it is possible to provide a workable understanding of "RICO injury," one that will allow it to operate effectively as a criterion separating appropriate and inappropriate invocations of civil RICO. There is no doubt that this is a formidable task. Even those courts that have enunciated a special injury requirement have disagreed on the appropriate definition of that requirement. *See* Pet. App. 21a (citing "competitive" and "racketeering" injury cases). Such definition will by necessity serve as the framework for a case-by-case application and refinement of the concept.

But this recognition hardly suggests that it would be better to avoid enunciating a standard altogether. There is nothing especially foreign to our jurisprudence about a standing rule that is defined with less than mathematical precision. For example, in the securities field, the task of defining the "purchaser-seller" requirement in fraud actions under the 1934 Act has been complex and difficult, and has

had to go forward without any express direction from Congress concerning the proper limits of the cause of action it created. But from its first clear articulation in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert denied*, 343 U.S. 956 (1952), to its most recent review in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the concept has stood the test of time and become central to securities regulation theory and practice. The same is true of the concept of "antitrust injury" itself, which has required a period of evolution[31] but now plays a useful role in effectuating the intent of Congress in that field.

Still, even as to these limitations, which have existed for some time, there is no litmus test that can readily sort out the caes that are properly within the statute's ambit from those that are not. Instead, it is necessary for the federal courts to apply these basic concepts to the particular facts presented on a case-by-case basis. Such a process necessarily leads to legitimate disagreement in a few cases. But there is no justification for abandoning a rule that can easily sort out most cases simply because it is somewhat imprecise at its outer boundaries. The same criticism could be made with respect to many different legal principles that are subject to good-faith judicial application.

In view of this recognition, it becomes clear that the substantive provisions of the RICO statute, read in light of the legislative history, supply quite suffi-

[31]See *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, *supra*; *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

cient guidance for the development of a reasonable definition of "RICO injury." As we have suggested, the technical requirements for a violation of RICO set out in section 1962 are deliberatly flexible.[32] But to say that a statute is flexible is not the same as saying that it is silent. Even as it sought to limit the hurdles facing the Justice Department in putting together a RICO case, the Congress selected terminology which goes a long way toward indicating the kinds of cases in which the statute was to be used.

The central theme of section 1962 is that there must be an "enterprise" that is either acquired or operated through a "pattern of racketeering activity." These concepts are closely interrelated. Taken together, they capture much of the essence of what Congress meant when it set out to create a weapon agianst "organized crime."

With this preliminary understanding in mind, it is possible to focus on the particular circumstances in which such a pattern of activity can give rise to a RICO violation. There are two main criteria. First, a legitimate business can be "infiltrated" *by means of* a pattern of racketeering activity, 18 U.S.C. 1962(a), (b), and operated for criminal purposes, *id.* 1962(c). Here, the relevant criteria are neither obscure nor particularly controversial. The statute requires either that the business be bought with funds obtained through a previous pattern of racketeering, or that the acquisition itself be accomplished through a pattern of predicate acts like extortion, bribery, and so forth.

[32]This is especially true of section 1962(c), which, as this Court has recognized, *United States v. Turkette*, *supra*, applies to many different kinds of entities, as long as they are somehow involved in racketeering.

Where such an infiltration is accomplished either with funds stemming from a prior criminal history or by means of a pattern of criminal acts, there is, almost by definition, an example of the kinds of "organized crime" activities that Congress sought to attack. The very act of infiltrating a legitimate enterpise, combined with a series of related predicate offenses, carries with it a suggestion of systematic and professional criminality clearly within the intent of the statute.

As a result, we believe that "RICO injuries" include, to begin with, all harms caused directly by the infiltration of legitimate enterprise by habitual criminals or through criminal means. One such harm, of course, would be the "competitive injury" caused to competing businesses by the unfair tactics of an infiltrated enterprise—coercion of potential customers, bribery of public officials to obtain special advantages, destruction of competitiors' facilities, evasion of taxes in order to gain a competitive advantage, etc. But there are other possibilities as well.

Senator McClellan took the trouble to outline them in detail. Once a business is taken over. "[l]abor unions [may be] infiltrated" to the detriment of workers. Sometimes, "the mob bleeds a firm of assets, then takes bankruptcy," or it "steals securities and then uses the stolen securities to fraudulently obtain funds from lending institutions. 116 Cong. Rec. 591 (1970).

In sum, the *infiltration* criterion is relatively easy to define and the injuries arising out of such conduct are relatively easy to identify.

The second RICO paradigm, while somewhat less well-defined, is no less real. In light of this Court's decision in *Turkette*, it is clear that RICO applies not only to infiltrated legitimate enterprises but to wholly illegitimate ones. The next question therefore is: what are the hallmarks of a criminal enterprise that falls within the intended scope of RICO?

The answer, in our view, is that the enterprise must have enough of the central, generic attributes characteristic of "organized crime." This is not to say that in civil RICO plaintiff must allege a connection between the defendants and organized crime associations, *but he must show how the specified conduct is characterisitic of the acts engaged in by organized criminals.* These attributes are hard to set out with precision because, in the words of Congressman Poff, a RICO sponsor, organized crime "is a functional or sociological concept like white collar or street crime, serving simply as a shorthand method of referring to a large and varying group of individual offenses committed in diverse circumstances." 116 Cong. Rec. 35,344 (1970).

Nevertheless, the main characteristics of what Congress meant by "organized crime" can be described.

First, there must be a true "enterprise" engaging in a real "pattern" of conduct. To satisfy this criterion, it would be necessary to demonstrate the existence of similar kinds of crimes committed by the same groups of people, a well-established internal hierarchy, a system of organizational discipline, and other similar characteristics. As the Court put it in *Turkette*, a criminal "enterprise" is "proved by

evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583.

Second, it is also necessary to evaluate the substance of the particular criminal acts at issue. Conduct characteristic of organized criminal behavior exists along a continuim, from actions quintessentially criminal to acts almost indistinguishable from those which are the grist of civil commercial disputes in the modern age.

On one end of this continuim are most of the acts proscribed in Sec. 1961 (1)—murder, kidnap, arson, extortion, narcotics trafficking and the like. Closely aligned to these are proscriptions of such predicate acts as bribery and labor racketeering, which were considered, not only by the drafters but by the various committees of Congress for nearly two decades before the law was exacted. These reach at the heart of Congress' concerns regarding organized crime—force, coercion, and corruption of the marketplace and our political institutions.

Aligned at the distant end of this spectrum are the acts which ironically have formed the basis for the overwhelming number of Civil RICO suits—"mail fraud", "wire fraud", and securities "violations". These represent conduct which *may* be viewed as relatively ambiguous, when compared with those acts which are the essential badges of organized criminals. The plaintiff relying on such predicate acts would therefore have to alledge "something more " a connection to violence, corruption of labor or the public fisc, or perversion of civil or regulatory process.

While not airtight, these basic principles for determining whether a case properly involves RICO injury provide a sensible approach. They insure that the civil remedy is limited to situations involving activities that RICO sought to stamp out. They will prevent the gross misuse of the law which has occurred in the lower federal courts.

Indeed, the usefulness of these guiding principles can be readily illustrated by applying them to the facts of *Haroco* and this case. First, in neither case is there any indication of infiltration into legitimate enterprise by criminals seeking control. Neither the bank in *Haroco* nor the Imrex Company ever became the agents of persons with pre-existing patterns of criminality. Second, neither company took on any of the characteristics of a criminal "organization" or committed acts that suggest that they had become functionally comparable to organized crime syndicates. Instead, what we have here are two conventional and legitimate businesses that are alleged to have committed certain acts of fraud, one in its commercial dealings with customers, and one in its dealings with a single coventurer. These cases represent as well as any could the problems that would arise in the absence of a meaningful "RICO injury" requirement. They are cases where the RICO civil damages remedy has become an instrument exploited by plaintiffs who cannot possibly claim injuries caused by the particular depredations which the Congress sought to eliminate from the life of the nation.

III. THE STRUCTURE OF THE RICO STATUTE REVEALS THAT CONGESS EXPECTED CIVIL SUITS TO BE BROUGHT ONLY AFTER DEFENDANTS HAVE BEEN CONVICTED OF THE UNDERLYING PREDICATE ACTS.

The Second Circuit further held that a treble damages suit under RICO may only be brought after the defedant has been convicted criminally of the predicate offenses on which the plaintiff seeks to rely.[33] Conceding that the statutory language is ambiguous on this point, the court relied primarily on the unique structure of civil RICO as a cause of action premised on a showing of previously committed *crimes*, and the attendant problems that would rise if plaintiffs were allowed to prove such crimes civilly. Pet. App. 38a-41a. It found no evidence that Congress deliberately created a civil cause of action with such inherent difficulties. On the contrary, it showed how the entire remaining structure of the statute reveals an assumtion that RICO targets have been or are being, convicted of crimes in duly conducted criminal proceedings. Pet. Ap.. 37a, 4la-44a.

This ruling, in our view, rests on a correct analysis of the statute and its underlying intent. To be sure, the alternative approach—allowing plaintiffs to put their opponents on trial for crimes—is not ruled out by the statutory language itself, but neither is it compelled. The process of statutory intepretation therefore must turn on which approach best conforms to the basic structure of the statute, of which the civil remedy is only one part.

[33]The court also held that the plaintiff could proceed on the basis of a prior *RICO* conviction. Pet. App. 42a.

As we have discussed, RICO was intended to be a flexible tool for *prosecutors* in their war against organized crime. The sanctions provided were deliberately ruinous.[34] but Congress believed that this was a justified way of dealing with persons who had a proven history of criminal conduct and had helped to produce the particular social harms caused by organized crime. The main protection against the abuse of such ruinous sanctions was reliance on the good judgment of the Department of Justice.

The civil remedy, with its own rather draconian sanction, was inserted into the bill at the last minute, and without much thought about its consistency with the overall structure. As we have already argued, Congress must at least have intended the courts to match the discretionary judgments asked of prosecutors with substantive limitations on the civil suits in which RICO could be invoked. Without the recognition of such a "RICO injury" doctrine, the reach of civil RICO would be essentially unchecked.

But we would go further. A similar analysis of the structure and history of RICO also provides convincing evidence that Congress intended any invocation of civil RICO to be preceded by some exercise of prosecutorial discretion—even if only with respect to the question of prosecution for the underlying predicate

[34]*United States v. Turkette, supra*, 452 U.S. at 591-93. *See, e.g.*, 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska) ("the combination of criminal and civil penalties in this title offers an extraordinary potential for striking a mortal blow against the property interests of organized crime"); *id.* at 35193 (remarks of Rep. Poff) (RICO "will deal not only with individuals, but also with the economic base through which these individuals constitute such a serious threat to the economic well-being of the Nation").

offenses. In other words, Congress did not intend any application of RICO to persons who were not proven criminals. And it revealed that intent by making the commission of crimes a central element of any RICO violations.

Section 1964(c) provides for civil damages whenever a person is injured "by reason of a violation of section 1962." Section 1962, in turn, bars the acquisition or operation of an "enterprise" through a "pattern of racketeering activity." And "racketeering activity,'" is defined in section 1961(1) as (1) any of a number of specified criminal acts "chargeable under State law," (2) any act which is "indictable" under the federal laws governing bankruptcy, securities fraud, and narcotics trafficking. Petitioner, of course, makes much of the fact that the statute refers to acts that are "chargeable" or "indictable," arguing that the plain language authorizes civil plaintiffs to prove the occurrence of predicate crimes that have never been actually prosecuted but *could* be. Pet. Br. at 11-16.

Before jumping to this conclusion, however, it is important to realize that section 1961 was drafted long before the civil RICO provision was added. As written, therefore, section 1961 was part of a statute that provided exclusively for governmental enforcement.

What Congress had in mind were federal RICO prosecutions where there could not sensibly be a requirement of prior state or federal convictions on the pedicate acts. On the contrary, it is well established that federal prosecutors may prove the commission of predicate offenses in the same criminal trial in which they seek to prove a violation of RICO. *See* Pet. App.

38a. As a result, it made perfect sense for Congress to define "racketeering activity" in terms of "chargeable" or "indictable" acts.

The issue here thus boils down to whether Congress intended a different sequence of events when, later in the legislative process, it inserted the civil damages provision. We think it did.[35]

The evidence of this assumption is not hard to discern. First and most importanly, there is the fact that Congress went out of its way to define the elements of a RICO violation, not in terms of certain forms of bad conduct, but in terms of the commission of pre-existing criminal offenses. This legislative decision made sense, of course, since the goal was to attack those involved in organized *crime*.

RICO was thus deliberately predicated on the status of being a "criminal," a status that traditionally comes about not only after a person has violated the law but also after a prosecutor has made the discre-

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[35] As the Second Circuit noted, Pet. App. 29a-31a, a number of courts have rejected a prior conviction requirement. But most of those decisions stem from the ruling in *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), involving the issue of injunctions sought by the *government* against persons who had no prior convictions. Obviously, the question of such a civil action by the same prosecutors who could bring a RICO prosecution at any time is very different from the question of privately initiated damage suits. In this regard, we note that the injunctive provisions in 1964 were in the RICO bill long before the civil damages provision was added by the House.

tionary decision to prosecute'" and there has been a full oportunity for a criminal trial. That being true, it simply makes no sense to conclude that Congress ever imagined that a civil court would determine, in a privately initiated and conducted lawsuit, that the defendant was a "racketeer" guilty of intentional violation of criminal statutes.

The flaw in the argument for a "no-conviction" reading of civil RICO is the assumption that the elements of the cause of action make no real diference—*i.e.*, that civil RICO is not significantly different from other federal damage remedies, such as those under the Clayton Act or the securities laws. To begin with, those statutes do not define the basis for violations specifically in terms of existing criminal offenses. They rest instead on a proscription of specific kinds of conduct that may, in certain circumstances, also be criminal. Moreover, while it may be true that the financial implications of a civil action are comparable in each instance, it is impossible to ignore the

[36]A contrary rule would contravene at least the spirit of the well-recognized rule that only a prosecutor in the Executive Branch may determine whether to initiate and pursue the prosecution of a criminal offense. *See United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 924 (1965).

There is also a danger that allowing plaintiffs to initiate civil actions on their own will invade the province of prosecutors in another way. Once a defendant has lost a civil RICO case, it is predictable that all sorts of informal pressure may be brought to bear on the prosecuting authorities to follow up this verdict with a prosecution of the same "proven" criminal.

Indeed, it is entirely possible that the prosecutor might seek to rely on the doctrine of affirmative collateral estoppel against the defendant in such a situation. On the other hand, if the defendant prevails in the civil suit and is then indicted by the prosecutor, he may seek to raise double jeopardy objections.

special character of a finding of RICO liability. To the world, a losing civil RICO defendant has suddenly been "proved" to be a criminal. Furthermore, when the appropriate criteria are used to measure the scope of the statute, the punitive nature of civil RICO becomes abundantly clear. These criteria were outlined in *Kennedy v. Mendoza Martinez*, 372 U.S. 144 (1963) and discussed again, with approval, in *United States v. Ward* 448 U.S. 242, 100 S. Ct. 2636 (1980). Among the characterisitics of a penal (punitive) statute, as opposed to a regulatory or remedial law are: (1) whether the sanction includes an affirmative restraint upon the defendant, (2) whether or not the sanction which may be invoked by the law is historically regarded as punishment, (3) whether or not there is a requirement of scienter in the component acts, (4) whether retribution and/or deterrance are a goal of the statute's operation, and (5) whether the behavior referenced in the statute's sanctions is already a crime. In sum, all the basic concepts and structure of civil RICO lead to the conclusion that it was intended to be *punitive* in application.

It is indeed difficult to reconcile the clearly punitive structure and scope of the civil remedy with the notion that such a RICO case may be proved by a mere preponderance of the evidence, in a civil trial, especially when it will typically allege as predicate acts mail fraud or wire fraud, offenses subject to elastic interpretation and broad application.

As a result, the most plausible interpretation of civil RICO is that Congress intended a defendant to have the same benefit that is available to every criminal RICO defendant—a chance to defend against the charged predicate offenses in a criminal pro-

ceeding where he can avail himself of the full panoply of rights and protections that are uniquely ganted to criminal defendants.[17] That chance can be assured only if civil RICO is limited to persons already convicted of the underlying offenses.

Such a rule would be a natural complement to the RICO injury requirement, becaue it too would guard against the trivializing of the statute.The requirement of a proper prosecution and conviction, while imposing no new substantive limitation on the persons who may be sued civilly under RICO, would help to prevent application of the statute in cases were only the most creative plaintiffs' lawyer would discern criminality. Many criminal statutes, including some listed in section 1961, are phrased broadly, but a responsible prosecutor will limit his efforts to cases where the violation is clear and the consequences serious. In the absence of a prior-conviction rule, however, potential plaintiffs, hopeful of conjuring up a claim for treble damages, can be trusted to take just the opposite approach. And juries, knowing that the "punishment" for the "crime" is a damage award—not a jail sentence—may find merit in a case that would come out otherwise if it were truly tried as a criminal prosecution.

Some pertinent practical criticisms of the prior conviction requirement have been advanced by peti-

[17] *U.S. v. One Assortment of 89 Firearms*, 104 S.Ct. 1099 (1984), cited by petitioner, does not require a ruling to the contrary. That case restated the rule that a prior *acquittal* in a criminal case *does not prevent* (either by way of collateral estoppel or double jeopardy), the subsequent prosecution of a remedial civil suit requiring proof of related facts. That is not the requirement of a civil RICO action, *where the criminal conduct itself is an element of the proof.*

tioner. First, it argues that the prior conviction rule would unduly affect criminal prosecutions. The argument is that a link between convictions and civil RICO claims, by giving victims a financial stake in successful prosecutions, would lead to undue pressures on prosecutors and, at the same time, compromise those victims when they appear as witnesses in criminal trials. Pet. Br. at 25-26. But there is no reason to believe that the financial stake of potential RICO plaintiffs would be materially different from that of any other person who has a potential tort claim that might also be prosecutable. In every such case, the victim's chances of winning punitive damages, comparable to RICO treble damages, in his civil recovery will be much improved if there has been a successful prior prosecution. But the criminal-justice system still leaves the *prosecutors* the power to decide whether to prosecute, and relies constantly on complaining witnesses with potential tort claims. Indeed, prosecutors regularly rely on witnesses who are much more thoroughly "compromised," such as co-conspirators who have turned state's evidence.

These facts are also sufficient to dispose of petitioner's next argument—that it would be unfair to prevent civil RICO claims in cases where prosecutions are barred on Fourth Amendment or similar grounds, or are terminated by pleas to non-predicate act crimes. Pet. Br. at 26. If there is nothing unusual or inappropriate about allowing prosecutors to control the cases in which RICO treble damages are available, it is equally unexceptional for claims to be barred where prosecutors choose to accept pleas or simply are unable to prove their case, for whatever reason. Indeed, the link between predicate-act convictions and

treble damages may provide a useful new weapon to the arsenal of prosecutors.

Finally, there is the complaint that a prior-conviction rule would alter the statute of limitations or split off RICO causes of action from related state-law claims. Pet. Br. at 27. These arguments depend on the premise that there is something wrong with having a civil RICO claim triggered by an event—conviction—that comes later than the predicate act and may come after the completion of a related state civil suit. However, other than raising misleading questions about the danger of giving plaintiffs two "days in court", petitioner offers no basis for the notion that it would be unworkable to hinge a federal civil claim on a criminal conviction.

In sum, the "most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward—that a criminal conviction must precede a private civil suit." Pet. App. 40a. The civil damage remedy was never perceived as more than an adjunct of the prosecutorial provisions included in this criminal statute. The intent of Congress can be most effectively implemented if prosecutors are left some role in determining when a civil case may be brought, and civil defendants are given the right to defend against charges of criminality in a *criminal* proceeding.

CONCLUSION

For these reasons, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

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